84-1592

No. .....

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

DANIEL R. SMELSER,
Petitioner,

v.

THE HONORABLE CHARLES KELLEY,
Judge of the District Court,
Oklahoma County, Oklahoma,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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April, 1985

26 pp

QUESTION PRESENTED

Is "minimum contacts" a prerequisite before a state can exercise in personam jurisdiction over an individual in a child custody modification proceeding pursuant to a Uniform Child Custody and Jurisdiction Act and Title 28 U.S.C. Section 1738A?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	12

CERTIFICATE OF SERVICE follows Petition.

APPENDIX A:
Order of the Oklahoma Supreme Court

APPENDIX B:
Journal Entry After Hearing on Special Appearance and Motion to Quash

APPENDIX C:
Fourteenth Amendment, United States Constitution

APPENDIX D:
Title 10 Okla. Stat. Sections 1603, 1605 (Oklahoma Uniform Child Custody and Jurisdiction Act)

APPENDIX E:
Title 28 United States Code Section 1738A

TABLE OF AUTHORITIES

Cases PAGE(S)

Ex Parte Dean, 447 So.2d 733 (Ala. 1984) 5, 11

Hanson v. *Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958) 6, 7

Hines v. *Clendenning*, 465 P.2d 460 (Okla. 1970) 9

Hudson v. *Hudson*, 569 P.2d 521 (Okla. 1976) 9

International Shoe Co. v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) 6, 7, 9

Kulko v. *Superior Court of California*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed. 132 (1978) 5, 6, 8, 10

Kumar v. *Superior Court of Santa Clara County*, 186 Cal.Rep. 772 (1982) 8, 9

May v. *Anderson*, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953) 5, 10

Milliken v. *Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 2d 278 (1940) 8

Mullane v. *Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) 7

Pennoyer v. *Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878) 6, 7

Shaffer v. *Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977) 6, 7, 8

Sibley v. *Superior Court*, 128 Cal.Rep. 34, 546 P.2d 322, (1976) 9

Titus v. *Superior Court*, 100 Cal.Rep. 477 (1972) 9

White v. *White*, 618 P.2d 921 (Okla. 1980) 9

Yarbrough v. *Elmer Bunker & Associates*, C.A. Okla., 669 F.2d 614 (1982) 9

Yery v. *Yery*, 629 P.2d 357 (Okla. 1981) 9

United States Constitution

Fourteenth Amendment 2

AUTHORITIES CONTINUED PAGE(S)

Statutes and Codes

28 U.S.C. Sec. 1738A 2, 4

10 O.S. Sec. 1603 2

10 O.S. Sec. 1605 2

12 O.S. Sec. 1701 9

California Civil Code Procedure Ann., Sec. 410.10 9

Other Authorities

American Law Institutes Restatement (2nd) of Contract Law, Sec. 37 (1971) 10

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Oklahoma County, Oklahoma,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

The petitioner, Daniel R. Smelser, prays that a Writ of Certiorari issue to review the Opinion of the Oklahoma Supreme Court.

OPINIONS BELOW

The opinion, dated January 29, 1985, of the Supreme Court of Oklahoma, is set out in Appendix A and is a non-reported opinion.

The Order, dated November 16, 1985, of the District Court of Oklahoma County, Oklahoma is set out in Appendix B and is a non-reported opinion.

JURISDICTION

The opinion sought to be reviewed was entered by the Oklahoma Supreme Court on the 29th day of Jaunary, 1985.

The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution:

See Appendix C

Title 10 Oklahoma Statutes, Sections 1603, 1605 (1980):

(Oklahoma Uniform Child Custody and Jurisdiction Act)

See Appendix D

Title 28 United States Code, Section 1738A, Subsection (a), (c), (d) and (f) (1980):

See Appendix E.

STATEMENT OF THE CASE

The petitioner, Daniel R. Smelser, and plaintiff, Lisa Smelser, in trial court, were residents of Oklahoma and had been so for some years prior to their marriage on December 6, 1979. The parties had established a residence in Oklahoma, worked in Oklahoma, associated with friends, relatives, doctors and so on during the course of their stay in Oklahoma. The minor child, Phillip Smelser, born April 11, 1981, was born in Oklahoma and resided in Oklahoma until he was almost two years of age. During the latter part of December, 1982 or first part of January, 1983, Lisa Smelser,

took the minor child to the State of Washington for a period of "separation", established the necessary residency, immediately filed for divorce and was granted custody of the minor child in May, 1984, in a consensual decree of divorce.

The petitioner had remained in the State of Oklahoma and continues to reside in Oklahoma. Immediately after the divorce, in May or June of 1984, Lisa Smelser moved to California and commenced residing with her boyfriend. The minor child on a visit related information to the petitioner that his mother was physically and verbally abusive to him in his home in California. The petitioner registered the Washington Decree of Divorce in Oklahoma and filed a Motion to Modify custody in September, 1984, alleging the foregoing information. The petitioner sought emergency custody of the minor child.

At a hearing on November 16, 1984, the Honorable Charles Kelley ruled that the situation was "grim" but there was no emergency as defined by Oklahoma law. Judge Kelley sustained a Motion to Quash the Motion to Modify on the basis that Oklahoma was not the appropriate forum and that the case should be referred to California pursuant to the guidelines of the Oklahoma Uniform Child Custody and Jurisdiction Act, Title 10 Oklahoma Statutes Section 1601, et. seq. The petitioner argued that California did not have jurisdiction as the petitioner had no contacts whatsoever with the State of California; that Washington was no longer the appropriate jurisdiction as Lisa Smelser and the minor child was no longer living there and that Oklahoma was the only appropriate jurisdiction since both parties had the necessary contacts with the State of Oklahoma.

The petitioner sought a Writ of Mandamus before the Oklahoma Supreme Court. The Oklahoma Supreme Court declined to accept original jurisdiction, stating only, "Application to assume original jurisdiction denied." The Order was rendered on January 29, 1985.

REASONS FOR GRANTING THE WRIT

The Oklahoma trial judge's declination of jurisdiction and his deferral of jurisdiction to the State of California eliminated the necessity of "minimum contacts" under the under the Uniform Child Custody and Jurisdiction Act of Oklahoma, [Title 10 Oklahoma Statutes Section 1601, *et. seq.* (Supp. 1980)], hereinafter referred to as the UCCJA, and Parental Kidnapping Prevention Act of 1980, [Title 28 United States Code Section 1738A, *et. seq.*], hereinafter referred to as the PKPA. Without the requirements of "minimum contacts", a state could subject a non-custodial parent to prosecuting or defending in a forum with which he has no contact and could encourage "forum shopping" by a custodial parent.

The framers of the UCCJA in various states, drawing from the Model Version of the UCCJA, and the enactment of the PKPA did not intend to supplant the jurisdictional requirement of the "minimum contacts" doctrine as set forth hereinafter in order to establish in personam jurisdiction over an individual in a custody action. If the framers had intended to do so, there would have been a "reincarnation of the monster" that the UCCJA attempted to prevent, that is, forum shopping by the custody parent with actual physical custody of a child and the custodial parent

who is "armed" with a Decree of Divorce. In the former instance, a parent with custody of the child could go to a state, reside there for six months to establish the necessary six months to make that state the "home state" within the meaning of the UCCJA; petition the court for custody of the minor child and exercise jurisdiction over the non-custodial parent who has no connection with that state whatsoever other than the fact that his soon-to-be former spouse and child reside in that state. The same would also be true of a custodial parent who has already obtained a decree of divorce and registers that decree in another state which does not have the minimum contacts with the non-custodial parent. For example, the custodial parent with the Decree of Divorce could move to Alaska, register the Decree, obtain service on the non-custodial parent and have that state exercise jurisdiction over the non-custodial parent. The custodial parent then moves to New York and so on. In each instance a terrible injustice would be worked on the non-custodial parent because the non-custodial parent would have to defend the action in a foreign forum with which he or she has no contacts. The UCCJA and PKPA would be working in reverse and would be supporting the very thing that they were intended to eradicate.

A child custody determination is an in personam proceeding requiring in personam jurisdiction over both the affected parties. *May* v. *Anderson,* 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953); *Kulko* v. *Superior Court of California,* 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed. 132 (1978); *Ex Parte Dean,* 447 So.2d 733 (Ala. 1984).

"The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state

courts to enter judgments affecting *rights or interests of nonresident defendants.* [emphasis added by petitioner] *See Shaffer* v. *Heitner,* 433 U.S. 186, 198-200, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977)." Cited in *Kulko* v. *California,* supra.

"Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations." *International Shoe Co.* v. *Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

There must be sufficient ties within the forum state such that it would be reasonable and just, according to traditional concepts of fair play and substantial justice, to permit the state to make binding judgment on the defendant. *International Shoe Co.* v. *Washington,* supra.

"The unilateral activity of those who claim some relationship with a *nonresident* [emphasis added] defendant cannot satisfy the requirement of contact with the forum state . . . It is essential in each case that there be some act by which the defendant *purposefully* [emphasis added] avails himself of the privilege of conducting activities with the forum state . . . .", *Hanson* v. *Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

Any judgment purporting to bind the person of a defendant over whom the court had not acquired in personam jurisdiction is void within the State as well as without. *Hanson* v. *Denckla,* supra, at 253; *Pennoyer* v. *Neff,* 95 U.S. 714, 24 L.Ed. 565 (1978).

"Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction." *Hanson* v. *Denckla,* supra.

"However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." *Hanson* v. *Denckla,* supra; *International Shoe Co.* v. *Washington,* supra.

There must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *Hanson* v. *Denckla,* supra.; *International Shoe Co.* v. *Washington,* supra.

The Due Process Clause "does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Shaffer* v. *Heitner,* supra.; *International Shoe Co.* v. *Washington,* supra.

It has long been held that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant. *Pennoyer* v. *Neff,* 95 U.S. 714 (1878); *International Shoe Co.* v. *Washington,* supra. The existence of personal jurisdiction, in turn, depends upon the presence or reasonable notice to the defendant that an action has been brought. *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) and a

sufficient connection between the defendant and the forum State as to make it fair to require defense of the action in the forum. *Milliken* v. *Meyer,* 311 U.S. 457, 463, 464, 61 S.Ct. 339, 85 L.Ed.2d 278 (1940); *Kulko* v. *Superior Court of California,* supra.

The act of a parent in consenting to and sending their children to a particular forum where they would then permanently reside with the other parent does not confer in personam jurisdiction over that parent in the forum state. The defendant did not purposefully derive benefit from any activities relating to the forum State. While it is correct that the forum State may have substantial interests in protecting resident children and in facilitating child-support actions on behalf of those children, these interests do not make the forum State a "fair forum," [*Shaffer* v. *Heitner,* supra at 215], in which to require a party, who derives no personal or commercial benefit from the children's presence in the forum State and who lacks any other relevant contact with the State, either to defend a child support suit or to suffer liability by default. *Kulko* v. *Superior Court of California,* supra.

The respondent mother has attempted to build a "straw bridge" to cross the river in order to establish in personam jurisdiction over the petitioner and it is improbable that the "bridge" will stand the weight applied on it. In *Kumar* v. *Superior Court of Santa Clara County,* 186 Cal.Rep. 772, 775 (1982); the Supreme Court of California stated that a nonresident's use of habeas corpus proceedings *and* the registration of a foreign decree was insufficient contacts with California for California to establish in personam jurisdiction over the nonresident father in a custody action

where the mother was a resident of California. See also: *Titus* v. *Superior Court,* 100 Cal.Rep. 477 (1972). Also, *Kumar,* at 781, indicates that *neither execution of a guaranty agreement nor a special appearance* in California was sufficient to establish in personam jurisdiction over a non-resident. See also: *Sibley* v. *Superior Court,* 128 Cal.Rep. 34, 546 P.2d. 322 (1976).

In *Oklahoma,* the foregoing standards have been applied to whether a Court of this state could or could not exercise in personam jurisdiction. In *Yery* v. *Yery,* 629 P.2d 357 (Okla. 1981), the Court followed the reasoning in *International Shoe, Milliken, McGee, Hanson,* and *Kulko,* in determining whether an ex-husband was amenable to in personam jurisdiction by a court of the State of Oklahoma. Oklahoma appears to have completely endorsed the "minimum contacts rule" as it applies to divorce related matters. Oklahoma has applied the same rule to its "Long Arm Statute" in interpreting same. SEE, Title 12 O.S. Sec. 1701 *et. seq.; Yarbrough* v. *Elmer Bunker & Associates,* C.A. Okl. 669 F.2d 614 (1982); *Hudson* v. *Hudson,* 569 P.2d 521 (Okla. 1976); *Hines* v. *Clendenning,* 465 P.2d 460 (Okla. 1970); *White* v. *White,* 618 P.2d 921 (Okla. 1980); *Yery,* supra.

In *California,* it too has enacted a "Long Arm Statute," but that statute does not give California the right to exercise jurisdiction over an individual absent the requisite minimum contacts necessary. However, *Kulko,* supra at 89, 101, dispelled any notions that California might have in trying to exercise jurisdiction over an individual under the "effects" rule. See *California Civil Procedure Code Ann.* Sec. 410.10. In *Kulko,* the Court cited with approval the

American Law Institute's Restatement (Second) of Conflict of Law, Sec. 37 (1971), which provides:

> "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by any act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."

The Court then went through an analysis of all the nonresident's actions when compared to the prior Supreme Court cases and rejected the ruling by California that it could exercise in personam jurisdiction over the defendant, *Kulko,* stating:

> "We therefore believe that the state Courts in the instant case failed to heed our admonition that 'the flexible standard of International Shoe does not "herald" the eventual demise of all restrictions on the personal jurisdiction of state Courts.' "

Kulko, supra at 101.

The respondent mother is the one who moved to California, took the minor with her, created the adverse living conditions in California, not the petitioner. *Kulko,* supra at 97, spoke to this issue also, stating: "It is appellant who has remained in the State of the marital domicile, whereas it is appellee [California resident—emphasis added] who has moved across the continent." Cf. *May* v. *Anderson,* supra at 534-535. The conclusion is inescapable that California had absolutely no contacts with the petitioner herein, therefore, the respondent judge in the trial court in Oklahoma should have accepted the case.

In *Ex Parte Dean,* supra, the Alabama Supreme Court analyzed the Minimum Contacts rule, the UCCJA and the Federal Parental Kidnapping Prevention Act in determining whether a Court could or could not exercise in personam jurisdiction over any individual. The court concluded that absent minimum contacts, a court could not exercise jurisdiction over an individual regardless of the enactment of the UCCJA and PKPA.

In *Ex Parte Dean,* the father had petitioned an Alabama court for custody of child by enforcement of a prior Florida Decree of Divorce which had awarded the father a divorce and permanent custody of the child. The court analyzed the United States Supreme Court cases in regard to the exercise of in personam jurisdiction over an individual in divorce and custody cases. The Alabama court concluded that neither the Florida "long arm statute," the PKPA or Florida's UCCJA authorized in personam jurisdiction over a nonresident who did not have sufficient "minimum contacts" with that forum, therefore, the Florida Decree of Divorce awarding the father permanent custody was not entitled to full faith and credit.

The instant situation is very analogous to the *Dean* situation, except for the matters being related to the original decree of divorce and the instant situation being related to a post-divorce matter. The petitioner maintains that *Ex Parte Dean's* reasoning is sound and the analysis should be applied to the instant case.

CONCLUSION

In conclusion, the petitioner maintains that the respondent mother unilaterally precipitated the move to California; that the petitioner has no contacts with the State of California; that California is without jurisdiction over the petitioner; that the Honorable Judge Kelley, Judge of the District Court of Oklahoma County, State of Oklahoma, should have analyzed the situation and accepted the case in Oklahoma as that State has the most significant connection with both parties and the minor child. The petitioner does not have the "minimum contacts" with California for it to exercise jurisdiction over the petitioner. For the reasons hereinabove set forth, a Writ of Certiorari should issue to the Oklahoma Supreme Court.

Respectfully submitted,

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Attorney for Petitioner

April, 1985

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of _____, 1985, true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed with first class postage thereon prepaid, return receipt requested, to Mr. James H. Buxton, 2600 S. Broadway, Edmond, Oklahoma 73034 and Judge Charles Kelley, Oklahoma County Court House, 321 Park Avenue, Oklahoma City, Oklahoma 73102. The above listed parties are all of the parties required to be served.

Sidney D. Brown, OBA #1238

APPENDIX A

[Filed Jan. 29, 1985]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, January 29, 1985

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

63,515 Daniel R. Smelser v. The Hon. Charles Kelley, Judge of the District Court, Oklahoma County, Oklahoma.

Application to assume original jurisdiction denied.

CONCUR: Simms, C.J., Doolin, V.C.J., Hodges, Lavender, Hargrave, Opala, Wilson, Kauger, JJ.

* * *

APPENDIX B

[Filed Dec. 10, 1984]

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

DANIEL R. SMELSER, Plaintiff,	)	
vs.	)	Case No. FD 84-6458
LISA SMELSER, Defendant.	)	

JOURNAL ENTRY AFTER HEARING
ON SPECIAL APPEARANCE AND MOTION TO QUASH

NOW, on this 16th day of November, 1984, this matter comes on for hearing upon the Motion to Quash filed herein by the defendant. The plaintiff appears in person and by and through his attorney, Sidney D. Brown, and the defendant appears specially by and through her attorney, James H. Buxton. The Court finds that the defendant filed herein on November 15, 1984, a special appearance and Motion to Quash, and a Brief in Support thereof, and the Court thereupon did grant the plaintiff until the following morning, November 16, in which to respond, and that on November 16, 1984, plaintiff did file herein his Brief in Support of Oklahoma assuming jurisdiction of this matter.

The Court finds that the State of California is a more appropriate forum in which to litigate this matter, and absent a showing of an emergency, that the case should be litigated in the State of California. Thereupon, the Court proceeds to hear evidence, and at the conclusion thereof, the Court finds that no emergency has been shown, and that by reason thereof, this Court should decline to exercise jurisdiction. Thereupon, the Court confers with Judge Nichols of the Superior Court of Santa Clara County, California, and the judges thereupon agree the Superior Court of Santa Clara County, California, should assume jurisdic-

tion of this matter, and that the District Court of Oklahoma County, Oklahoma, should decline to exercise jurisdiction.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this Court hereby declines to exercise jurisdiction on the basis of the Uniform Child Custody Jurisdiction Act.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that no emergency exists such as to invoke the emergency jurisdiction of the Court.

IT IS SO ORDERED.

(s) *Charles Kelley*
Judge of the District Court

Approved:

(s) *James H. Buxton*
Attorney for Defendant

(s) *Sidney D. Brown*
Attorney for Plaintiff

APPENDIX C

Fourteenth Amendment to the United States Constitution

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX D

TITLE 10 OKLAHOMA STATUTES SECTION 1603 (SUPP. 1980)

Application of Act (UCCJA)

The provisions of this act shall apply to all custody proceedings brought within this state, whether as an initial proceeding or modification, and regardless of the absence of jurisdictional dispute.

TITLE 10 OKLAHOMA STATUTES SECTION 1605 (SUPP. 1980)

Prerequisites for Jurisdiction

A. A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
   1. This state:
      a. is the home state of the child at the time of the commencement of the proceeding, or
      b. had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from the state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
   2. It is in the best interest of the child that a court of this state assume jurisdiction because:
      a. the child and his parents, or the child and at least one contestant, have a significant connection with this state, and
      b. there is available in this state substantial evidence concerning the child's present or

future care, protection, training and personal relationships; or

3. The child is physically present in this state and:

   a. the child has been abandoned, or

   b. it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

4. a. It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs 1, 2 or 3 of this subsection, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and

   b. it is in the best interest of the child that this court assume jurisdiction.

B. Except under paragraph 3 and 4 of subsection A of this section, physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

C. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

D. The controlling criterion for awarding custody by a court of this state shall always be what is in the best interest of the child, other statutory provisions merely being factors which may be considered.

APPENDIX E

28 U.S.C. Sec. 1738A. Full faith and credit given to child custody determinations.

28 U.S.C. Sec. 1738A, states in pertinent part:

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the laws of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c) (1) of this continues to be met and such State remains the residence of the child or of any contestant

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

Office-Supreme Court, U.S.
FILED
MAY 8 1985
ALEXANDER L. STEVAS,
CLERK

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. 84-1592 (D)

DANIEL R. SMELSER,
Petitioner

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THE HONORABLE CHARLES KELLEY,
JUDGE OF THE DISTRICT COURT
OKLAHOMA COUNTY, OKLAHOMA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

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13

TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons Why the Writ Should Be Denied 4

Conclusion 10

TABLE OF AUTHORITIES

Cases	Page(s)
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	7, 8
Flint v. Ohio, 451 U.S. 619 (1981)	8, 9
Holt v. District Court, 626 P.2d 1336 (Okla. 1981)	5, 6
Kulko v. Superior Court of California, 436 U.S. 84 (1978)	5, 10
Maryland v. Baltimore Radio Shows, Inc., 338 U.S. 912 (1950)	9
May v. Anderson, 345 U.S. 528 (1953)	5
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	8
Murdock v. Memphis, 87 U.S. (20 Wall.), 590 (1875)	6
National Socialist Party of America v. Village of Skokie, 423 U.S. 43 (1977)	8
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945)	7
Worldwide Volkswagen v. Woodson, 444 U.S. 286 (1980)	10
Statutes and Codes	
28 U.S.C. Sec. 1257 (3)	6
10 O.S. Sec. 1601	5

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Respondent[1]

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

The real party in interest, Lisa Smelser, the Defendant below, prays that the Petition for a Writ of Certiorari to the Supreme Court of Oklahoma be denied.

STATEMENT OF THE CASE

This case involves a question of jurisdiction to determine custody of a four-year old child, Phillip

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[1] The parties in the trial court below are Daniel R. Smelser, Plaintiff; and Lisa Smelser, Defendant. Charles Kelley was the judge in the Trial Court, the Oklahoma District Court of Oklahoma County, Oklahoma.

Daniel Smelser. Phillip's parents, Lisa and Daniel separated in December, 1982, when Lisa moved to Seattle, Washington with her son, Phillip. The Parents were divorced in Seattle, Washington, in May, 1984,[2] in which action the Court granted custody of the child to the mother. Both parties submitted to the jurisdiction of the Superior Court in Washington. In May, 1984, after the divorce, the mother moved to California with her son.

In October, 1984, the father filed a Motion to Modify Child Custody in Oklahoma, alleging an emergency.[3] Then, ostensibly for his regular fall visitation, the father traveled to California, signed an agreement that he would return the child to the mother in two weeks, and returned with the child to Oklahoma. After returning to Oklahoma, (where the child had not lived for over two years), the father had the mother served in California with the process which the father had filed before he left. The respondent mother made a special appearance in the Oklahoma action.[4]

After hearing evidence, the Honorable Judge Kelley ruled on November 16, 1984 that no emergency existed and declined to exercise jurisdiction over the matter.[5] Judge Kelley then called Judge Nichols in California (before whom the custody

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[2] *Smelser v. Smelser*, Case No. JFD 84-6458 (Oklahoma District Court, Oklahoma County, filed October 24, 1984, Petition, Exhibit "A").

[3] *Smelser v. Smelser*, Case No. JFD 84-6458 (Oklahoma District Court, Oklahoma County, filed October 24, 1984) [hereinafter, Trial Court.]

[4] Trial Court, Special Appearance and Motion to Quash.

[5] Trial Court, Journal Entry of November 16, 1984.

issue was then pending as well), and the two judges agreed that this case be transferred to Judge Nichols in California. The mother returned with her son to their home in California.

From the trial court's ruling, the Petitioner chose to take two simultaneous routes to the Oklahoma Supreme Court. First, he appealed the trial court's act of declining to exercise jurisdiction.[6] Second, he sought to have the Oklahoma Supreme Court assume original jurisdiction and issue a Writ of Mandamus in his favor.[7]

In seeking the Writ of Mandamus, the Petitioner contended that the trial judge concluded that the Oklahoma District Court should not have jurisdiction of this case. He further contended that a California Court cannot have *in personam* jurisdiction of the Petitioner for failure of minimum contracts.[8] In the separate appeal of the decision of the trial Court to the Oklahoma Supreme Court, Petitioner raised (*inter alia*) the issues of the abuse of discretion by the trial judge in declining jurisdiction and the lack of minimum contacts required for a California Court to exercise *in personam* jurisdiction over the Petitioner.[9]

Upon declination of original jurisdiction by the Oklahoma Supreme Court in *Smelser v. Kelley*, the

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[6] *Smelser v. Smelser*, #63500 (Okla. Supreme Ct., Filed December 14, 1984) [hereinafter Oklahoma Appeal.]

[7] *Smelser v. The Honorable Charles Kelley*, #63515 (Okla. Supreme Ct., filed December 17, 1984, denied by Order, January 29, 1985) [hereinafter Application for Writ of Mandamus.]

[8] Application for Writ of Mandamus, Petition, pp. 4-5.

[9] Oklahoma Appeal, Petition in Error, Exhibit "C".

Petitioner sought a writ of certiorari in this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *Neither the decision below nor the record raises the question presented in the Petition.*

The sole question presented in the Petition (p. i.) is whether "minimum contacts" are a prerequisite to the exercise of *in personam* jurisdiction by a State Court over an individual in a child custody modification proceeding. Petitioner's approach to this issue is novel. He asserts that the Oklahoma Court *has* minimum contacts and relies on alleged *lack* of contacts in the California forum. He does not make a collateral attack upon the Washington judgment for lack of *in personam* jurisdiction. On the contrary, he registered the Washington Divorce Decree in the trial Court. He does not appeal on the cause in which he is named Defendant in California and presents no record to show the California action's finality. In short, the argument he raises for the requirement of "minimum contacts" in an action to determine the custody of a child inure to the benefit of the mother and are precisely the reasons for which the Defendant below made her special appearance to question the jurisdiction over her person by the Oklahoma Trial Court.

2. *The record fails to show that the trial Court or the Oklahoma Supreme Court decided a matter of Federal law.*

Neither the decision of the Oklahoma State Supreme Court, nor the decision of Judge Kelley in the Oklahoma County District Court clarify whether the declination of jurisdiction was made upon constitutional grounds based in the fourteenth amend-

ment, or upon state law based on the Uniform Child Custody Jurisdiction Act as adopted by Oklahoma, Title 10, Oklahoma Statutes, Section 1601, et.seq. (Supp. 1980), [hereinafter referred to as the U.C.C.J.A.]

It is well settled that a child custody determination is an action which requires *in personam* jurisdiction over both of the parents as a matter of Federal law. *May v. Anderson*, 354 U.S. 528 (1953); *Kulko v. Superior Court of California*, 436 U.S. 84 (1978).

However, under the discretionary provisions of the U.C.C.J.A. the Oklahoma Courts have declined to exercise jurisdiction as a matter of State law. In *Holt v. District Court* 626 P.2d 1336 (1981), the Oklahoma Court adopted the two step approach to determine whether to exercise jurisdiction. This approach presents two questions: First, does the Court have jurisdiction under the Act, and second, if so, should that Court exercise its jurisdiction. 626 P.2d at 1341. The Court explained the Oklahoma version of the U.C.C.J.A. as follows:

> Our version of the U.C.C.J.A. contains four prerequisites for jurisdiction . . . They are alternative, and if the requirements of any one of the four are met an Oklahoma Court has jurisdiction. *Even if jurisdiction exists, however, it may not be proper for the Court to exercise its jurisdiction.* There are three grounds set out in the Act, one mandatory and two discretionary on which the Court must, or should decline to exercise jurisdiction . . . In addition, the jurisdiction of an Oklahoma Court to modify a custody decree rendered by the Court of another

state is substantially curtailed." 626 P.2d at 1341. (Emphasis added.)

One of the discretionary grounds for declining to exercise jurisdiction is "when the Petitioner has snatched the child, and improperly retained custody after visitation, or engaged in similar reprehensible conduct." (*Id.*) Because the case has been appealed, *Smelser v. Smelser*, No. 63500 (Okla. filed December 14, 1984), the State's Supreme Court may yet render a decision showing adequate state grounds to support the Trial Court's decision. Therefore, the Petitioner cannot, as required by the Rules of the Supreme Court of the United States, 21.1(h), show "the way in which [the Federal questions] were passed upon by the Court . . . " Nor would review be proper, if the decision is determined by the State Supreme Court to have been based upon adequate State grounds. *Murdock v. Memphis*, 87 U.S. (20 Wall), 590 (1875).

3. *The Petitioner has failed to establish that the Order appealed from is final and, therefore, fails to establish the jurisdiction of this Court.*

The Petitioner invokes the jurisdiction of this Court under the provision of 28 U.S.C. 1257(3). This jurisdictional grant by Congress requires both a "final judgment or decree" and a federal question. The Petitioner has presented neither in his Petition. By pursuing two routes of appeal, only one of which is completed, the Petitioner brings this matter before this Court while the matter is still pending before the State Supreme Court.

The general interpretation of this jurisdictional statute precludes review "where anything further remains to be determined by a State Court."

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945). However, circumstances may exist in a "very few" cases in which the "highest court of a State has finally determined the Federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). Although this Court now recognizes four categories described in *Cox Broadcasting* in which the decision will be treated as a final order on the Federal issue, "[i]n most, if not all, of the cases in these categories, the additional proceedings would not require the decision of other Federal questions that might also require review by the Court at a later date . . . " *Cox Broadcasting*, at 477. When the Petitioner himself seeks further review of the very issue raised there, in a state appellate proceeding, he should not be heard to say that the order in the intervening proceeding is final.

The case presented by the Petitioner meets none of the exceptions enumerated in *Cox Broadcasting*. The case does not meet the requirements of the first three categories. First, there is no final decision of a Federal question, as shown in reason two above.

Second, a decision of the federal question presented here will not render "the outcome of further proceedings preordained." *Cox Broadcasting* at 479. If the Petitioner prevails in showing that California does not have requisite minimum contacts over his person, the mother still has the full panoply of fourteenth amendment protection from the imposition of *in personam* jurisdiction in Oklahoma. If that hurdle is cleared, then the trial Court

will reach the merits of the case, the outcome of which is not "preordained."

Third, if jurisdiction is accepted by the Oklahoma Courts a broad range of issues, including the Federal question of whether full faith and credit should be given the Washington divorce decree, will be presented for later appellate review.

Nor will allowing the case to proceed in the normal appellate process of the State of Oklahoma preclude review of the Federal question. On the contrary, only by such proceeding will the record below reflect the basis of the decision of the trial Court.

The fourth category presented in *Cox Broadcasting*, 420 U.S. at 482-483, allows this Court to treat as final those decisions in which the State Court's decision on a Federal question might seriously erode a Federal Policy. In the issues presented by *Cox Broadcasting* this Court was able to clarify "an important question of freedom of the press under the First Amendment," *Cox Broadcasting*, at 486, removed the shadow under which the press was operating in Georgia, and most importantly brought the litigation to an end. *Id.* This Court has accepted cases for review when the Federal issue could be clarified and long and complex litigation avoided. See *Miami Herald Publishing Co., v. Tornillo*, 418 U.S. 241 (1974); and *National Socialists Party of America v. Village of Skokie*, 423 U.S. 43 (1977). This Court has refused to grant a Writ of Certiorari, when the case presented no final judgment and other Federal issues remain to be resolved. *Flint v. Ohio*, 451 U.S. 619 (1981). In the *Flint* case, delaying review of whether or not a publication is obscene until the Petitioner was convicted by the court below was

held not to seriously erode Federal policy within the meaning of prior cases. *Id.* at 622.

A ruling in this case in favor of the Petitioner would not end litigation in the Court below, nor does the Petitioner raise a compelling Federal Policy, which would be seriously eroded by this Court's decision to wait until the record below is in a proper posture for decision of the Federal question.

4. *The cloudy record below commands the exercise of judicial prudence by not granting the Writ of Certiorari.*

When a record is cloudy, even when important questions are raised, judicial policy may require that the Writ of Certiorari be denied, with the hope that different aspects of an issue be illumined by the Courts below. *Maryland v. Baltimore Radio Shows, Inc.*, 338 U.S. 912 (1950).

The record below is deficient in other respects on the issue of whether the trial Court had jurisdiction. The Petitioner argues that the Oklahoma Court cannot dismiss his action because the California Court cannot gain jurisdiction over his person. There have been no hearings held on the contacts which Petitioner has with California, nor would it be proper for an Oklahoma Court to make the jurisdictional decision for the California Court. There is simply no record offered by the father which would justify any finding of minimum contacts over the mother except the presence of the child, which was accomplished by holding the child in Oklahoma beyond the visitation return date. Even if the father had absolutely no contacts in the State of California, he cannot argue that jurisdic-

tion is proper against the mother when she merely acquiesced in having her child make a visitation to the State of Oklahoma [*Kulko v. Superior Court*, 436 U.S. 84 (1978)], nor did she have a reasonable expectation of being haled into the Oklahoma Court because of her activities in California. *Worldwide Volkswagon v. Woodson*, 444 U.S. 286 (1980).

Furthermore, no adversarial hearing has been conducted for the purpose of determining the truth of the allegations of activities occurring in California, but only upon the issue of whether an emergency existed. Consequently, the cloudy record presented by this case does not present the issue properly developed for review.

CONCLUSION

In conclusion, the respondent urges this Court to consider the incomplete nature of the record below, the lack of a final judgment clearly expressing any Federal issue upon which the State Court may have ruled, and the absence of any compelling Federal policy to be protected by an immediate action of the Court, in reaching a decision to deny the Writ of Certiorari.

Respectfully submitted,

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